IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs December 17, 2008

STATE OF TENNESSEE v. KEVIN DONALD FRIEDMAN

Direct Appeal from the Criminal Court for Loudon County
No. 10904 Allen W. Wallace, Judge

No. E2008-00353-CCA-R3-CD - Filed August 7, 2009

A Loudon County Criminal Court jury found the appellant, Kevin Donald Friedman, guilty of reckless aggravated assault, a Class D felony, and underage consumption of alcohol, a Class A misdemeanor. The trial court imposed a total effective sentence of two years to be suspended after serving six months in confinement. On appeal, the appellant challenges the trial court's denial of full probation. Upon our review of the record and the parties' briefs, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court are Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and THOMAS T. WOODALL, J., joined.

Joe H. Walker (on appeal) and Walter B. Johnson, II (at trial and on appeal), Harriman, Tennessee, for the appellant, Kevin Donald Friedman.

Robert E. Cooper, Jr., Attorney General and Reporter; Elizabeth B. Marney, Senior Counsel; Russell Johnson, District Attorney General; and Frank Harvey, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

In December 2004, a Loudon County Grand Jury returned a multi-count indictment charging the appellant with the aggravated assault of the victim, Richard Garrison, and underage consumption of alcohol. At trial, the victim testified that on the night of April 3, 2004, he and his wife, Polly, returned home at 7:00 or 7:30 p.m.[1] Later in the evening, their son, Rodney; their daughter, Stephanie; and several of their children's friends, one of whom was Tommie Forsythe, came to their home. The victim said that the group seemed tense and that Forsythe argued with someone on the

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[1] Some of the witnesses in this case share a surname. Therefore, for clarity, we have chosen to utilize their first names. We mean no disrespect to these individuals.

telephone. The victim noted that neither he, his wife, nor his guests drank beer at his house that night.

The victim testified that around midnight or later, a vehicle pulled into his driveway. The vehicle contained at least one female, Kristian Hatcher, and three men, one of whom was the appellant. At that time, the victim was inside the house. Polly, Rodney, Stephanie, and their friends were outside the house. Hatcher got out of the vehicle and ran toward Forsythe. The two young women met in the front yard and began fighting. The victim came out of the house, cursed, and demanded that the group get off his property; however, they refused to comply. Polly attempted to separate the women and grabbed Forsythe by the waist, attempting to pull her away from the fight. The appellant pushed Polly, causing her to fall. The victim approached the appellant but did not threaten or hit him. The appellant hit the victim on the side of the head with a Corona beer bottle, and the victim fell to the ground, unconscious. The appellant jumped on top of him, repeatedly punching him in the head with his fists. As one of the appellant's friends held the victim's legs, another friend held his neck.

The victim testified that an ambulance transported him to the hospital where he stayed for three days. The victim explained that later that week, the surgeons "had to go and cut underneath my eyelid and repair the blowout fracture to my orbital socket." The victim opined that his injuries were too severe to have been caused by blows from only a fist.

Deputy Craig Brewer testified that in the early morning hours of April 4, 2004, he was dispatched to a location to find the appellant. When Deputy Brewer encountered him, the appellant had blood on his body and "appeared to have been in an altercation." Deputy Brewer said the appellant "had a smell of an alcoholic beverage about his person, slurred speech, bloodshot eyes." The appellant told Deputy Brewer that he had consumed two or three Corona beers. Deputy Brewer transported the appellant to the Loudon County Jail.

On April 8, 2004, the appellant was taken to the Loudon County Criminal Justice Center. He was advised of his Miranda rights, and he gave the following version of the events:

> I didn't use a beer bottle. I picked – I pushed the guy's wife to get her away from the girls who were fighting after she kicked one of the girls in the head. Then a guy hit me in the head with a beer bottle and I hit him about six times, no more than eight.

Lieutenant John Houston of the Loudon County Sheriff's Department testified that he did not see any injuries on the appellant, but he acknowledged that the appellant's fist was swollen. Lieutenant Houston said that one Corona beer bottle was collected from the scene but that no fingerprints were on the bottle.

The appellant testified that on April 3, 2004, he was playing video games and "just chilling" at the house of his friend, Mitchell Grubb. The appellant estimated that he had consumed two or three beers. He explained, "Corona is my beer of choice. But all of the people know that." That night, three cars drove by, "revving up their engines, cussing us, flipping us a bird, saying f[***]

you." The appellant stated that Rodney Garrison and Tommie Forsythe were in the cars. The appellant said that telephone calls were exchanged and that Rodney "[was] saying come over to their house."

The appellant testified that he and some friends, including his seventeen-year-old girlfriend, Kristian Hatcher, drove to the victim's house. The appellant maintained that they did not take any beer bottles with them. The appellant said that "as soon as we got out of the car," the victim confronted them and ordered them to leave. The appellant said he told the victim they were there so Hatcher and Forsythe could fight. The victim said that the girls could fight but that then they had to leave.

The appellant testified that the girls "just ran right into each other" and started fighting. Two or three minutes later, Polly came out of the house, grabbed Hatcher by the hair, and kicked her in the face. The appellant said Polly was a "grown woman beating up a little girl." The appellant testified that he said, "[W]hoa" to stop Polly and that "when I was doing that [the victim] hit me with a beer bottle on the top of the head." The appellant complained, "I got hit with a beer bottle by a grown man. I'm 19 years old." The appellant said that after being struck with the bottle, he retaliated, using his fists to hit the victim. The appellant gave differing statements as to how many times he hit the victim, ranging from three to eight times. The appellant denied that he hit the victim after the victim fell to the ground. The appellant said he and his friends left after the girls' fight ended.

Additional defense witnesses testified, namely Mitchell Grubb, Kristian Hatcher, and Robert Rhymes. Their testimony essentially comported with the appellant's testimony.

At the conclusion of the proof, the jury found the appellant guilty of reckless aggravated assault, a Class D felony, and underage consumption of alcohol, a Class A misdemeanor. At the sentencing hearing, the trial court imposed sentences of two years and eleven months and twenty-nine days, respectively, and ordered that the sentences be served concurrently. The trial court found that due to the seriousness of the offense of reckless aggravated assault and to promote deterrence, the appellant should be denied full probation. Accordingly, the trial court ordered the appellant to serve six months of his sentence in the Loudon County Jail and the remainder of the sentence on probation. On appeal, the appellant challenges the trial court's denial of full probation.

II. Analysis

Appellate review of the length, range, or manner of service of a sentence is de novo. See Tenn. Code Ann. § 40-35-401(d) (2006). In conducting its de novo review, this court considers the following factors: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on enhancement and mitigating factors; (6) any statistical information provided by the administrative office of the courts as to sentencing practices for similar offenses in Tennessee; (7) any statement by the appellant in his own behalf; and (8) the potential for rehabilitation or

treatment. See Tenn. Code Ann. §§ 40-35-102, -103, -210 (2006); see also State v. Ashby, 823 S.W.2d 166, 168 (Tenn. 1991). The burden is on the appellant to demonstrate the impropriety of his sentence(s). See Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments. Moreover, if the record reveals that the trial court adequately considered sentencing principles and all relevant facts and circumstances, this court will accord the trial court's determinations a presumption of correctness. Id. at (d); Ashby, 823 S.W.2d at 169.

An appellant is eligible for alternative sentencing if the sentence actually imposed is ten years or less. See Tenn. Code Ann. § 40-35-303(a) (2006). Moreover, an appellant who is an especially mitigated or standard offender convicted of a Class C, D, or E felony should be considered a favorable candidate for alternative sentencing absent evidence to the contrary. See Tenn. Code Ann. § 40-35-102(6). The following sentencing considerations, set forth in Tennessee Code Annotated section 40-35-103(1), may constitute "evidence to the contrary":

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
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> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
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> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.

See also State v. Zeolia, 928 S.W.2d 457, 461 (Tenn. Crim. App. 1996). Additionally, a court should consider the defendant's potential or lack of potential for rehabilitation when determining if an alternative sentence would be appropriate. See Tenn. Code Ann. § 40-35-103(5).

In the instant case, the appellant is a Range I, standard offender convicted of a Class D felony; therefore, he is considered a favorable candidate for alternative sentencing. We note that the trial court granted the appellant an alternative sentence, namely split confinement. See Tenn. Code Ann. § 40-35-306(a) (2006); State v. Williams, 52 S.W.3d 109, 120 (Tenn. Crim. App. 2001).

The appellant argues that the trial court should have granted him full probation. In support of his argument, the appellant contends that, pursuant to Tennessee Code Annotated section 40-35-501(a)(3) and State v. Glynnon Bradshaw, No. 01C01-9810-CR-00439, 1999 WL 737871, at **2-3 (Tenn. Crim. App. at Nashville, Sept. 22, 1999), the trial court could not sentence him to serve a period in confinement that would exceed his release eligibility date. The appellant argues that "[i]n the instant case, the most that the [trial court] could have sentenced the [appellant] was 7.2 months. A review of the sentencing hearing does not justify the sentence of six months in this case."

This court has observed that "[t]he determination of whether the appellant is entitled to an alternative sentence and whether the appellant is entitled to full probation are different inquiries." State v. Boggs, 932 S.W.2d 467, 477 (Tenn. Crim. App. 1996). Generally, an appellant "is required

to establish his suitability for full probation as distinguished from his favorable candidacy for alternative sentencing in general." State v. Mounger, 7 S.W.3d 70, 78 (Tenn. Crim. App. 1999); see also Tenn. Code Ann. § 40-35-303(b) (2006). To prove his suitability, the appellant must establish that granting full probation will "'subserve the ends of justice and the best interest of both the public and the [appellant].'" State v. Dykes, 803 S.W.2d 250, 259 (Tenn. Crim. App. 1990) (quoting Hooper v. State, 297 S.W.2d 78, 81 (Tenn. 1956)), overruled on other grounds by State v. Hooper, 29 S.W.3d 1 (Tenn. 2000). Moreover,

> [i]n determining one's suitability for full probation, the court may consider the circumstances of the offense, the [appellant's] potential or lack of potential for rehabilitation, whether full probation will unduly depreciate the seriousness of the offense, and whether a sentence other than full probation would provide an effective deterrent to others likely to commit similar crimes.

Boggs, 932 S.W.2d at 477.

In the instant case, the trial court noted that the appellant refused to leave the victim's residence. The court stated that the appellant's "attitude on the witness stand bothers this [c]ourt a little bit, too. I realize . . . he admitted everything. But he kind of came across, so what. Not in those exact words, but . . . as all of this was being presented, you know, like so what." The court also expressed concern regarding the circumstances of the offense, stating as follows:

> In this case to go into a man's yard and him ask you to leave, . . . and he winds up with his eyelid falling out over his eye where he got hit with a beer bottle, I think a light sentence in this case, or just a slap on the hand, so to speak, is just almost a joke. A man's home is his castle. . . . I mean, that's about as serious as you can get.
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> . . . .
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> I think he ought to serve time. And I think he ought to be able to sit in jail and consider it a while.

From our review of the record, it appears that the trial court denied full probation based upon the appellant's lack of remorse, the seriousness of the offense, and deterrence. This court has previously recognized a "nexus between a remorseful attitude and the potential for rehabilitation." State v. Tadaryl Darnell Shipp, No. 03C01-9907-CR-00312, 2000 WL 290964, at *4 (Tenn. Crim. App. at Knoxville, Mar. 21, 2000). The trial court obviously believed that the appellant's "so what" attitude, combined with the seriousness of the offense and the need for deterrence, was a sufficient basis to refuse to grant full probation. Our review of the record reveals that the appellant did not establish that granting full probation will "'subserve the ends of justice and the best interest of both the public and the [appellant].'" Dykes, 803 S.W.2d at 259 (quoting Hooper, 297 S.W.2d at 81).

Accordingly, we conclude that the trial court did not err by denying the appellant's request for full probation.

III. Conclusion

Based upon the foregoing, we affirm the judgments of the trial court.

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NORMA McGEE OGLE, JUDGE